tinction between intentional and unintentional concealment is irrelevant.[3]

In any event there can be no question on this record that Jurors Hoffman and Brown were guilty of deliberate non-disclosure when they failed to answer as to their own political affiliations and activities. The transcript of the voir dire shows that revelation of past as well as present political membership was in the contemplation of the court as well as the jurors, except for the two jurors here in question. Contrast the failure of Jurors Brown and Hoffman to reveal their past membership in the Republican Club with the responses of: (1) Juror Ehling, who expressed doubt whether he was still a member of the Republican Club at Union (Tr. 44-45, Vol. II); (2) Juror Casey, who expressed doubt whether her son belonged to the Republican Club; (3) Juror Harvey, who stated that *two years before*, he belonged to the Democratic Club at Rolla (Tr. 45, Vol. II). By asking of Harvey the usual question, "Would that in any way affect you as a juror in this case?" (*ibid*), the court made clear, if it were not already clear, that past membership in such a club was within the purview of his questioning. Jurors Brown and Hoffman, who were present during the entire questioning of the panel, could not have concluded otherwise. See *United States ex rel. de Vita* v. *McCorkle, supra,* at 3.

And respondent has conceded that Juror Hoffman did fail to answer truthfully the *voir dire* question

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[3] Deliberate concealment is relevant in determining whether the concealing juror should be cited for contempt. *Clark* v. *United States*, 289 U.S. 1; see other cases cited at footnote 12(3), page 21, Petition.

asking whether any member of her family was a member of a political club. Respondent admits—as it must—that Juror Hoffman's son was treasurer of the County Republican Club, and that Juror Hoffman failed to say so.

To extract itself from this difficult position, respondent claims that the information Juror Hoffman concealed was "irrelevant" (Br. in Opp., p. 17). But it is not for respondent now to say what is or is not relevant on the *voir dire* examination. This examination was made by the trial judge and he, better than anyone else, was in a position to decide what matters were relevant. In this respect, it is particularly noteworthy that *none of the talesmen who disclosed political affiliations, however remote, were permitted to serve on the jury.* In short, as the facts of this case indicate, the political affiliations of the jurors were not only relevant, but were decisive;[4] and the failure to disclose them in the circumstances of this case clearly called for a new trial.[5]

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[4] The line of cases exemplified by *Frazier* v. *United States*, 335 U.S. 497, 513 (Br. in Opp., p. 18) and dealing with challenges for cause based on actual bias are not in point. This Court is not asked to determine whether the jurors' political activities would disqualify them as a matter of law for jury duty, but rather whether petitioner's right intelligently to exercise his peremptory challenges was infringed by the silence of the talesmen in response to the court's questions relating to their political activities.

[5] In relying upon *United States* v. *Johnson*, 327 U.S. 106, 111, for the proposition that the trial court's denial of the motion for a new trial should not be disturbed, respondent sets out the following quotation: "That findings * * * by trial courts on motions for new trial based on newly discovered evidence remain undisturbed except for most extraordinary circumstances . . ." (Br. in Opp., p. 18). The clause omitted from the quotation, and replaced by asterisks, is "on conflicting evidence"—a factor of considerable

III. The Successor Judge

A. *The Pre-verdict Motions.* In a significant misplacement of focus, respondent purports to limit petitioner's argument to a challenge of the rulings by the successor judge on the post-trial motions (Br. in Opp., pp. 32-33). Thus respondent obfuscates the equally serious issue presented by the pre-verdict motions, as to which the trial judge had expressly reserved his rulings, as he was specifically authorized to do by Rule 29(b), F.R. Crim. P.

The reservations of ruling by Judge Hulen were avowedly intended to give him the opportunity to reconsider and think over the different issues presented in the motions for mistrial[6] and judgment of acquittal, isolated from the pressing atmosphere of the trial. His views were unequivocally stated on the motion for mistrial:

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significance. No "conflicting evidence" whatever was offered by the Government in opposition to petitioner's motion for a new trial based on the jurors' non-disclosure, so that the facts presented at the post-trial hearing in this case were uncontroverted.

The *Johnson* case is also distinguishable for the further reason that the findings of the trial court were made by a judge whom this court considered "exceptionally qualified to pass on the affidavits" because he "had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day" (327 U.S. at 112). The converse obtains here, since Judge Nordbye, who ruled on the motion, was not present during the trial and never laid eyes on the jurors involved.

[6] With regard to the motion for mistrial, based on the damaging admissions of Schwimmer, introduced while he was a defendant at the trial, respondent twice makes the point that no objections were taken by petitioner to the court's withdrawing instruction (Br. in Opp., pp. 27, 28). No such objection was necessary in that posture of the record, since the court had previously overruled "at the present time" petitioner's motion for mistrial in which the point had been clearly raised (Tr. 1547). Cf. *Coca Cola Bottling Co. of Black Hills et al.* v. *Hubbard* (C.A. 8, 1953) 203 F. 2d 859, 861-2.

> "I am deeply conscious of the fact there is a serious question in the case * * * My present position is to let the case proceed and if there should be a conviction, then have time to give it the study it deserves" (Tr. 2208).[7]

Judge Hulen's position was the very antithesis of the "oversight" which the successor judge attributed to him (Appendix C, Petition, p. 25a). His mind and conscience felt deeply the responsibility for a difficult, worrisome decision as to which he wanted further time for more mature consideration. He was entitled to reserve his ruling as he repeatedly did (Tr. 2888, 2910), but death deprived him of his "last chance to correct his own errors," and in turn petitioner was denied such final determination on the part of the judge, who alone had "the feel of the case". *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216.

Respondent's statement to the contrary notwithstanding (Br. in Opp., p. 36, fn. 14), the successor judge specifically refrained from ruling:

> "In view of Judge Hulen's apparent disposition of the motions for judgment of acquittal, I am not disposed to discuss that question" (App. C, p. 26a).

Thus, no final adjudication was made by either judge on these pending motions, giving rise to a clear-cut violation of due process.

B. *The Post-verdict Motions.* There can be no question, after *Cone* v. *West Virginia Pulp and Paper Co., supra,* that, in passing on post-verdict motions, the

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[7] Similarly, Judge Hulen's last ruling on Exhibit 100-J was no more than tentative: "I am not satisfied," "it is a very doubtful question," "It is still a question that gives me a lot of concern" (Tr. 2912).

trial judge weighs the evidence and considers the credibility of the witnesses. Respondent ignores this principle when it equates the function of the trial court to that of an appellate court (Br. in Opp., p. 35).

Respondent does not explicitly deny the validity of petitioner's contention that, in a case where credibility is an important factor, a successor judge will be unable properly to perform post-verdict tasks. That principle has been applied in circumstances much less compelling than those present here, *Brennan* v. *Grisso* (C.A. D.C., 1952) 198 F. 2d 532; *Federal Deposit Insurance Corp.* v. *Siraco* (C.A. 2, 1949), 174 F. 2d 360, but respondent purports to distinguish these cases as involving a "dissimilar problem" (Br. in Opp., p. 38, fn. 17). Despite respondent's casual treatment (in a footnote) of these cases, they both stand as undisputed authority for the adoption of a liberal attitude towards the granting of a new trial where the element of credibility is significant.

In its feeble attempt to minimize the importance of the credibility factor here (Br. in Opp., p. 40), respondent closes its eyes to the plain facts of record (See particularly Pet., pp. 29-33). Moreover, it falls into the precise error of the Court below whose opinion it then proceeds to cite as authority. Respondent states that the bulk of the prosecution case was documentary, and that "there was not much to be gained by hearing the testimony of the witnesses and observing their demeanor that could not be gained by reading the testimony * * *" (Br. in Opp., p. 41). The emphasis on the importance of the documentary evidence is misplaced. Comparatively few of the documents introduced at the trial were read to the jury. Furthermore respondent completely overlooks the crucial and overwhelming significance of the oral testimony and demeanor of the

68 witnesses, including petitioner, and the impact on the jury of the extraordinary events of the trial, such as Schwimmer's severance (Pet., pp. 29-33). As any appellate court appreciates, these factors can hardly be assessed from the vantage point of 3300 odd pages of a cold typewritten record.

CONCLUSION

The three questions on which petitioner seeks certiorari sweep the full panorama of a criminal proceeding: from grand jury to petit jury to successor judge. Each of the questions presented poses a substantial and important problem, either presently unanswered or upon which the decided cases are in conflict. Respondent's resort to the merits—when it obviously knows better—and its failure to deal forthrightly with the importance of these questions in the certiorari context, should not be permitted to obscure the present need for guidance or resolution by this Court.

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For the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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